No. _____

IN THE

Supreme Court of the United States

October Term, 1989

Indiana Coal Council, Inc., and
Huntingburg Machinery & Equipment
Rental, Inc.,

Petitioners,

v.

Indiana Department of Natural Resources,
Wabash Valley Archaeological Society,
Inc., and Council for the Conservation
of Indiana Archaeology, Inc.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED

Whether the state violates the "takings" clause of the Fifth and Fourteenth Amendments when it properly exercises its police power to protect its historical and archaeological heritage from the adverse impacts of surface coal mining by designating a small portion of Petitioners' land unsuitable for surface coal mining and offers Petitioner the alternative (to not mining) of a data preservation plan which substantially advances the same purpose as the mining prohibition.

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STATEMENT OF THE CASE

A.

NATURE OF THE CASE

The Indiana Supreme Court found no violation of the Fifth and Fourteenth Amendments and ordered reinstatement of an Order by the Indiana Department of Natural Resources designating an archaeological site unsuitable for surface coal mining.

Petitioners Indiana Coal Council, Inc. (hereinafter "Coal Council") and Huntingburg Machinery & Equipment Rental, Inc. (hereinafter "HUMER") seek review of the Indiana Supreme Court's reversal of the trial court.

B.

COURSE OF PROCEEDING BELOW

Pursuant to a petition by Wabash Valley Archaeological Society, Inc. ("Wabash Valley") filed in accordance with IND. CODE §13-4.1-14-1 *et seq.* and 310 IND. ADMIN. CODE §12-2-1 *et seq.*, and after a preliminary administrative hearing, the Director of the Department of Natural Resources (the "Director") made an initial determination, on November 19, 1985, that the Beehunter archaeological site was unsuitable for surface coal mining. The Coal Council and HUMER objected and requested a hearing under the former Indiana Administrative Adjudication Act ("AAA"), IND. CODE §4-22-1-1, *et seq.* Wabash Valley and the Council for the Conservation of Indiana Archaeology, Inc. ("CCIA") intervened in support of the Director's action. After an evidentiary hearing, the Director, on January 3, 1986, issued his Findings of Fact and final decision designating the Beehunter Site unsuitable for surface coal mining.

The Coal Council and HUMER sought judicial review of the Director's decision in the Dubois County (Indiana) Circuit Court. On July 28, 1987, the Court entered "Findings and Conclusions," holding that the Director's designation of the Beehunter Site as unsuitable for surface coal mining amounted to an uncompensated "taking" of private property under the Fifth Amendment of the United States Constitution and Article I, §21 of the Indiana Constitution. On November 24, 1987, the trial court denied motions to correct errors in a revised entry also entitled "Findings and Conclusions." On appeal the Indiana Supreme Court reversed the Dubois County Circuit Court.

C.

FACTS RELEVANT TO ISSUES PRESENTED

The Beehunter site, designated unsuitable for surface coal mining by the Director, is a 6.57 acre portion of HUMER's 300 acre farm in Greene County, Indiana [App. A39, Finding 17]. Approximately 55,200 tons of coal are under the Beehunter site; approximately 1,537, 000 tons are under the entire property [App. A42, Finding 37]. The trial court and the Director both found that the archaeological resources of the Beehunter site have unusually important historic, cultural and scientific value [App. A20-22, Findings 20-30; App. A40-42, Findings 24-33], and that if surface coal mining operations are conducted on the site they would destroy those resources [App. A20, Finding 30; App. A42, Finding 34]. Beehunter was nominated and found eligible for listing on the National Register of Historic Places. 51 Fed. Reg. 6677 (1986). The site could be mined by other than surface means in which case sixty percent of the coal beneath Beehunter could be retrieved [App. A23, Finding 38].

The land in question has never been mined for coal. HUMER acquired the land in the 1940's, and it has been farmed since that time. There is no indication the land was acquired with the intent to mine coal. The designation does not prevent HUMER from continuing to farm the land, nor from mining virtually all the coal under the farmland, so long as the coal that lies underneath the site is extracted by means other than surface mining.

As part of his final Order designating the site unsuitable for surface coal mining, the Director also included a "mitigation plan" which provides *one* means by which the unsuitable designation could be removed, [App. A47] yet which would still provide for preservation of the data that is part of the State's cultural heritage. The plan provides for site testing and data recovery conducted by an archaeological contractor after which the area could be surface mined. However, HUMER is not required to carry out the plan nor to expend any money

under it. Further, under the plan HUMER is not required to convey the property or any property right to the State. In fact, HUMER does not need to do anything but may continue to farm the land or mine it by other than surface mining methods. The mitigation plan was provided only as an option to the landowners as *one* way in which they could ultimately surface mine the subject area. The plan simply provides for the preservation of archaeological information from the site prior to its destruction by surface mining; if properly excavated and analyzed, artifacts and other archaeological information could provide valuable knowledge concerning Indiana prehistoric cultures. Although Petitioners characterize this as an extortion plan and imply that the State would prefer this alternative [Petition, p. 6] testimony by the archaeologists at the administrative hearing indicated that because techniques for recovery of such data are constantly improving, the longer data recovery is delayed, the more information would ultimately be recovered from the site. This attempted accommodation to the landowner is *not necessarily* the State's preferred solution. The affect of the Order then is to offer the landowner three alternatives. HUMER can farm its entire property, including the Beehunter site; it can surface mine the coal on its property surrounding Beehunter and mine that site by other (than surface) methods; or it can follow the Director's mitigation plan.

Petitioners submitted a proposed mitigation plan [App. A521] prior to the administrative hearing. Petitioners claim incorrectly that the major difference in plans was that their plan would not have required monetary expenditures by HUMER and would have compensated the landowner for any damage caused by excavation [App. A2]. The Director's plan called for mitigation to be performed by an archaeological contractor who would supply necessary professional and technical personnel, facilities, testing, excavation supplies and materials. The mitigation was to be accomplished in accordance with professional standards and guidelines in two phases consisting of evaluation and data recovery. Significantly, if the testing indicated that no preserved sub-plowzone deposits with

recoverable context existed, the Director could declare the site to be a land *suitable* for surface coal mining and discontinue the investigation, leaving the owner free to mine the property if he or she wished [App. A48, Paragraph B]. If further investigation was indicated, however, it would proceed in a professional manner. The Director's plan, utilizing professional standards, specialized techniques, and careful recording would insure the securing of accurate data and serve to substantially advance the protection of the State's cultural heritage by preservation of the resource information [App. A48-51].

Petitioner's plan or offer, on the other hand, which expired on December 31, 1988 [App. A55, paragraph 12], did not propose *any* method or manner of investigation, did not propose any kind of standards or guidelines, but called for a Project Sponsor, set hours for the conduct of the activities at the site, specified that there would be no cost to HUMER, specified that HUMER be reimbursed for any damages, and set time deadlines [App. A52-56]. HUMER agreed to permit mitigation activities on the site until December 31, 1986, after which it could give notice at any time that it intended to commence mining operations and require that investigatory activities cease [App. A54, paragraph 12]. Additionally, Petitioner's offer was conditioned upon the Director agreeing to find that this "plan" successfully mitigated the impact of all future mining on the Beehunter site and that therefore the site was not unsuitable for surface mining [App. A55, paragraph 13]. No showing was made by Petitioners that its plan would serve in any way to preserve or protect the resource information. However, since the proposed plan expired on December 31, 1988 [App. A55, paragraph 12], there is no outstanding offer, and the issue is moot.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THE INDIANA SUPREME COURT CORRECTLY FOUND THAT THE STATE PROPERLY EXERCISED ITS POLICE POWER

This Court has repeatedly held that the government has considerable latitude in regulating property rights in ways that may adversely affect the owners. *Keystone Bituminous Coal Association v. DeBenedictis* (1987), 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472; *Penn Central Transportation Co. v. New York City* (1987), 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 472. This Court's decisions have established a two-prong test by which determinations with respect to "takings" questions may be measured. *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677; *Agins v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106. Under these tests a land use regulation, when applied to a specific piece of property, will not be considered as effecting a taking if the regulation substantially advances a legitimate state interest and does not deprive an owner of the economically viable use of his or her property.

The economic prong of the test is not in dispute. The Director's designation affected only one possible use of a very small portion of the HUMER property. HUMER had approximately 1,537,000 tons of coal beneath its fields, and the Director's decision affected only 6.5 percent of the total. Using undisputed data HUMER stands to earn nearly $1.8 million in coal royalties even if the Beehunter site and the buffer zone are never mined. *See* [App. A22-25, Ct. Fdgs. 33, 48, 49]. Furthermore, the designation does not affect the established use of the property, farming. There is no interference with any of HUMER's "investment-backed expectations." E.g., *Keystone Coal*, 94 L.Ed.2d at 494; *Hodel v. Virginia Surface Mining & Reclamation Ass'n* (1981), 452 U.S. 264, 295. Here, there is absolutely no evidence that HUMER made any investment based on the expectation that either the Beehunter site or the farm as a whole would be mined. Additionally, the owner

showed no reduction in the value of his property. The Indiana Supreme Court correctly decided the designation satisfied the economic prong of the takings test.

With respect to the state interest prong of the test the Indiana Supreme Court has correctly decided that the preservation of the state's cultural heritage was a legitimate state interest well within the legislature's police power to promote the general welfare; and that this interest was substantially advanced by the Director's designation of unsuitability as well as by the optional mitigation plan offered by the state to HUMER.[1] *Nollan* made clear that if the State may constitutionally deny a permit, then a permit with a condition is constitutional so long as the condition advances the same purpose that would justify denial.

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.

97 L.Ed.2d at 688-89. Moreover, the Court said, such a condition could be lawful even if it required a "permanent grant of continuous access to the property." *Id.* The Court continued, in reasoning directly applicable here:

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id.

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[1]The Indiana Supreme Court noted that the government has the power to enact laws and regulations to promote order, safety, health, morale and the general welfare of society. Court decisions make clear that a broad range of government interests satisfy the legitimacy requirement. *See Agins v. Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (scenic zoning); *Penn Central*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (landmark preservation); *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974) (maintaining stable integrated neighborhoods).

The reason for the inquiry into the end or goal of the condition, itself, is to "assure that the state does not effect a collateral purpose or end under the guise of a legitimate purpose or end, regulating where it has no right to do so." *Indiana Coal Council et al. v. Indiana Department of Natural Resources, et al* [App. A1-A14]. Petitioners attempt to focus on the mitigation plan in an effort to cast doubt on the State's motives for the designation. However, the mitigation plan offered to HUMER advances the same State interest that would justify an outright prohibition on surface mining — the State's interest in preserving its cultural heritage. The mitigation plan, if carried out, would allow adequate preservation of archaeological data from the site so that present and future generations would be able to study the information.

Simply designating the Beehunter site as an area unsuitable for surface coal mining would have been constitutional. However, because the State offered HUMER an alternative which *would* allow it to surface mine coal (i.e. the mitigation plan), Petitioners attempt to characterize this plan as some kind of extortion plot which unmasks the Director's designation as a taking. Clearly this is not the case, since the mitigation plan is offered as but one alternative for lifting the designation; for example, the relevant statutes and regulations would allow the owner to petition to have the Director remove a designation of unsuitability if circumstances change. *See* 310 IND. ADMIN. CODE §12-2-6(c). The Director's decision does not prohibit Petitioners from seeking such relief in the future. The Director's inclusion of the mitigation plan as an alternative to the prohibition is a *concession* to the owner, not an effort to coerce the owner into subsidizing the acquisition of information. In fact, archaeologist Robert Pace testified at the administrative hearing that because techniques for recovery of archaeological data are constantly improving, the longer data recovery is delayed, the more information would ultimately be recovered from the site [Tr. 201]. While the State cannot force anyone to undertake an archaeological study of the site, the State can try, and is trying, to prevent the total destruction of the site. So

long as the site is not destroyed, there remains the possibility of data recovery and preservation in the future. If the site is surface mined, however, the archaeological resources will be totally and irrevocably destroyed.

Petitioners attempt to present *Nollan* as imposing a new heightened scrutiny test on all land use restrictions. *Nollan* relied on the *Agins* rule that the regulation "substantially advance" a legitimate state interest and held that a condition to remove a land use restriction must also "substantially advance" that interest. *Nollan* at 834, 107 S.Ct. at 3146, 97 L.Ed.2d at 687. A closer examination of the government's purposes did need to be made in the *Nollan* case. However, no matter how or to what extent one scrutinizes the facts in the instant case, it is patently obvious that the mitigation plan substantially advances the exact legitimate state interest as the unsuitability designation, that of preserving the state's cultural heritage.

The Indiana Supreme Court's opinion does not purport to, and does not, deviate from any of this Court's decisions. Rather it faithfully follows them. Nothing in the Indiana Supreme Court's decision warrants review in this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the writ of certiorari be denied.

Respectfully submitted,

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